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to make the statute *fully* beneficial.[56] Certainly, also, this assignment possibility should be explored by creditors before resorting to the harshness of a Federal Bankruptcy liquidation. It should likewise be remembered that the Federal Bankruptcy Act[57] can be used to prod more informal arrangements under state laws. This prodding function is one of the purposes of the Federal Bankruptcy Act. Therefore, the mere presence of the Federal Act does not mean that it should be used at the first indication of financial illness. Rather, the Federal statute should represent a course of last resort to be followed only after an assignment (or other informal proceeding) has been considered. The rehabilitation of debtors, like lawsuits, should follow a methodical course. The harshest remedies (such as bankruptcy) should accordingly be reserved as a final alternative.

JULIUS JAY PERLMUTTER

LIQUIDATED DAMAGE PROVISIONS IN LEASE CONTRACTS

INTRODUCTION

With the increasing urbanization of American life and the tendency for population to center in large metropolitan areas, the instrumentality of the lease has gained greatly in economic importance. This is in large part due to the phenomenal rise in land values, requiring a large cash investment on the part of the purchaser. Another important factor is the ease and convenience of leasing rather than purchasing, since the term can be adjusted to meet the needs of the parties; thus it becomes unnecessary for an individual to obligate himself far into the future. These are important considerations in a dynamic and ever-changing economy.

Since the investment by the lessee is small and the lessor's only recourse in case of default is a personal action, with the resultant inconveniences and difficulties in terms of time and money, various devices have been used by lessors to secure against loss due to non-performance by the

56. The author believes two recommendations suggest themselves:

1—That a greater use be made of this feature of the law to aid the debtor seeking relief.

2—That the legislature be made aware of the obstacle to the use of this statute, namely, the requirement for the assignee to post a bond twice the amount of the assets involved, making it costly, inequitable and difficult to get a responsible person who would be willing to act as assignee at such great personal risk and expense. It is the author's firm belief that if enough attorneys, or the Florida Bar through appropriate means, call this to the attention of the legislature, our legislators will, as they should, amend this ancient statute in one simple but important phase—to permit bonds in a reasonable amount.

This will be more in line with bonds as required of Federal Receivers or Trustees, *i.e.*, $25,000 bond in an estate having assets in excess of $1,000,000. At any rate, it is suggested that bonds be required on a more realistic basis, perhaps, 25% or even as little as 10% of the amount of the assets involved in the assignment proceedings.

57. 52 STAT. 905-907 (1938), 11 U.S.C. 701-28 (1952).

lessee. The four most popular devices utilized consist of a stipulated sum of money put up by the lessee which is to be considered an *advance* payment of rent;[1] *security* constituting a fund out of which the lessor will indemnify himself for damages,[2] *consideration* for entering into the agreement;[3] or *liquidated damages* which provide the full measure of damages to the lessor[4] resulting from a default by the lessee.

By far the most frequently used device is a provision for liquidated damages, especially in long term leases, which involve large sums. It is to the question: "Under what circumstances courts will enforce liquidated damages provisions in lease contracts and when the courts will disregard such provisions?" that this paper is directed. This problem has special significance in Florida, and South Florida in particular, since the State's principle source of income is the tourist industry, with the result that the landlord and tenant relationship plays a large part in our economy and, incidentally, in the law practice of our attorneys. Unfortunately, like many of the jurisdictions throughout the country, the decisions of the Florida Supreme Court have not always been consistent, thereby creating the oft-lamented result, that litigation in this area is increasing.[5] Because of this situation much of our discussion will deal with Florida Law.

In one period at common law, forfeiture provisions were invariably enforced regardless of the oppressive results.[6] Later, however, the tide shifted, reflecting an attitude which disfavored provisions allowing parties to determine in advance what their damages will be[7] and in some instances legislation was enacted which made the drawing of enforceable liquidated damages provisions extremely difficult.[8] It is now generally conceded that parties to a contract may validly stipulate for liquidated damages if the resultant damages are not fixed by law and if the intent of the parties is to provide in good faith a sum which will approximate the probable damages which will result from breach or non-performance.[9] However, if the *intent* of the parties, gleaned from the contract, is not to provide a pre-estimate of probable loss, but rather as an instrument of coercion for dutiful performance or to provide a fund as security to indemnify

1. Householder v. Black, 62 So.2d 50 (Fla. 1952); Casino Amusement Co. v. Ocean Beach Amusement Co., 101 Fla. 59, 113 So. 559 (1931).
2. Depner v. Joseph Zukin Blouses, 13 Cal. App.2d 124, 56 P.2d 574 (1936); Pable v. Zebrowski, 15 N.Y. Super. 261, 82 A.2d 352 (1951).
3. *In re* Sun Drug Co., 4 F.2d 843 (9th Cir. 1925); A-1 Garage v. Lange Inv. Co., 6 Cal. App.2d 593, 44 P.2d 681 (1935).
4. International Paper Co. v. Priscilla Co., 281 Mass. 22, 183 N.E. 58 (1932); Southern Motor Supply Co. v. Shelburne Motor Co., 172 Okla. 495, 46 P.2d 562 (1935).
5. Seven cases have been presented to the Florida Supreme Court since its first decision in this area in 1952.
6. McCormick, Damages pp. 601-2 (1st ed. 1935).
7. *Ibid.*
8. Cal. Civ. Code §§ 1670, 1671 (1949); Okla. Stat. Ann. tit. 15, §§ 214, 215 (1941).
9. Lamson Co. v. Elliot-Taylor-Woolfensem Co., 25 F.2d 4 (6th Cir. 1928); Downtown Harvard Lunch Club v. Rasco Inc., 201 Misc. 1087, 107 N.Y.S.2d 918 (Sup. Ct. 1951).

the lessor against loss, the agreed upon sum will be considered as constituting a penalty and will be unenforceable as liquidated damages.[10]

Intent of the parties

As in other contract provisions, the intention of the parties is considered a cardinal, if not conclusive factor in determining the validity of a liquidated damages provision.[11] Therefore, intent is a question of law to be decided by the courts,[12] and when the intention of the parties can be determined by the terms and circumstances surrounding the contract, the language used by the parties, no matter how clear, is subordinated.[13] This usually occurs when the unambiguous language of the lease calls for liquidated damages, since language denoting a penalty will be usually interpreted as such. But on some occasions language denoting a penalty provision has not been given such a construction.[14] Certain words, however, have connotations indicating a penalty provision in and of themselves, and are to be avoided to preclude an improper interpretation.[15]

The intent of the parties is usually to be determined by the circumstances surrounding the parties at the time of execution of the contract, and not at the time of breach.[16] Therefore, it is immaterial that at the time of breach the stipulated sum appears to be proportionate to probable damages, if at the time of execution there was a *possibility* that the sum could prove to be excessive, which then will render the provision penal in nature. As a practical matter, it is impossible for the courts to shut out the knowledge of how the lease actually worked out, and a conjecture that in common practice the courts *do* consider the damages incident to a particular breach seems well founded. As will be noted,[17] some courts candidly consider all factors, including the breach itself, to determine the validity of a liquidated damages provision.

Since the question of intent is not always easy to ascertain, the courts have evolved a set of rules and principles to be used as guideposts in their determination of the parties' intent. These rules undoubtedly arose from the legal propensity toward consistency and the necessity to find a convenient method to interpret difficult fact situations. The effect of these

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10. Redmon v. Graham, 211 Cal. 491, 295 Pac. 1031 (1931); Wyll v. Kent, 56 S.W.2d 505 (Tex. Civ. App., 1932).

11. J. B. Colt & Co. v. Armstrong Tight Co., 17 Ala. App. 378, 85 So. 570 (1920); Mayor of Brunswick v. Aetna Indemnity Co., 4 Ga. App. 722, 62 S.E. 475 (1908).

12. Arnold v. First Saving and Trust Co. of Tampa, 104 Fla. 545, 141 So. 608 (1932); Greenblatt v. McCall, 67 Fla. 165, 64 So. 748 (1914); Smith v. Newell, 37 Fla. 147, 20 So. 249 (1896).

13. See note 12 *supra*.

14. United States v. Bethlehem Steel Co., 205 U.S. 105, 110 (1907).

15. Brown-Crummer Co. v. W. M. Rice Const. Co., 285 Fed. 673, 674 (5th Cir. 1923) ("forfeited" considered penal); Truck v. Marshall Silver Mining Co., 8 Colo. 113, 114, 5 Pac. 838, 839 (1884)(bond considered prima facie evidence of a penal obligation). Wilkes v. Bierne, 68 Va. 82, 69 S.E. 366 (1910).

16. See note 11 *supra*.

17. See note 26 *infra*.

rules, in a practical sense, has been many times to disregard the intent of the parties, necessarily a complicated subjective matter, and to substitute in its stead a series of objective principles, which the parties may have had, but probably did not consider in drawing the contract. This is largely responsible for the confusion and inconsistencies in interpretation in this area, since many times courts have failed to apply these rules in situations clearly calling for their application in order to achieve an equitable result.

It is important to note that what follows is an analysis of the requisites laid down by the courts, the presence or absence of which seem essential to a valid liquidated damages provision.

One sum fixed for several possible breaches

One clause which has given the courts a great deal of difficulty, and which has resulted in the undoing of many an unwary attorney is a provision calling for the forfeiture of an agreed sum, in the event of a breach by the lessee of covenants of varying degrees of importance, for any of which the stitpulated sum is excessive.[18] Therefore, if the same sum is to be retained by the lessor for a breach of a trivial covenant, such as to pay the light bill, as well as the covenant to pay rent, and the sum is excessive as to the former covenant, the entire provision falls as a penalty, even though there was a breach in the latter covenant. The courts generally have adhered to this rule rigidly, grounding their reasoning on the fact that under such a provision the intent of the parties could not have been an attempt to pre-estimate their possible damages, since a *possibility* existed that the damages *might* be excessive.[19]

To avoid the harsh effect of a strict adherence to this rule, many courts have made an important distinction between a clause calling for forfeiture upon a *mere* breach of a covenant and a clause which results in forfeiture only upon *termination* of the lease in the event of a breach.[20] The rationale behind this distinction is not altogether clear and frequently the courts have overlooked it.[21] The tenuous nature of this distinction is indicated when one considers that under either clause there is a possibility that the sum will be forfeited by a breach of a trivial covenant. This is true since most of the clauses calling for forfeiture of a sum upon termination of the lease predicate termination upon breach of any number of trivial and material covenants.

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18. Davy v. Crawford, 147 Fed. 574 (D.C. 1945); Seidlity v. Auerbach, 230 N.Y. 167, 129 N.E. 461 (1920); Stenor v. Lester, 58 So.2d 672 (Fla. 1952).

19. *In re* Frey, 26 F.2d 472 (D.C. 1928); Comm'r of Insurance v. Massachusetts Acc. Co., 310 Mass. 769, 39 N.E.2d 759 (1942); Stewart v. Basey, 150 Tex. 666, 245 S.W.2d 484 (1952); Wyll v. Kent, 56 S.W.2d 505 (Tex. Civ. App., 1932).

20. Burns Trading Co. v. Welborn, 81 F.2d 691 (10th Cir. 1936); Hyman v. Cohen, 73 So.2d 393 (1954).

21. Kaplan v. Katz, 58 So.2d 853 (Fla. 1952); Lenco, Inc. v. Hirschfeld, 247 N.Y. 44, 159 N.E. 719 (1928).

This distinction was made the basis of the decision in *Burns Trading Co. v. Welborn.*[22] The court reasoned that the *intent* of the parties was to secure not merely damages incident to a breach of one covenant but also damages arising from premature termination of the lease. The loss incurred would be the same regardless of the breach necessary to terminate the lease. Since the breach here consisted of a default in a rental installment, no mention was made of the possibility that a trivial covenant might also have terminated the lease.

Other courts have reasoned with greater clarity, interpreting such a provision to find that the *intent* of the parties was to provide for termination only upon breach of a material condition, notwithstanding the language of the contract.[23] Another view, upholding such a clause as for liquidated damages, reasons that since a court of equity will not countenance termination for breach of a trivial covenant,[24] forfeiture will occur only when the lease is terminated for breach of a material covenant.[25] The reasoning here reaches a good practical result but it can not be reconciled with the view that the intent of the parties at the time of the execution of conract is to be controlling; since here the question of inent seems to be disregarded altogether.

A departure from the accepted interpretations of such clauses, but subject to similar criticism, was made in *Smith v. Lambert*[26] where forfeiture of an agreed sum was predicated on a termination of the lease. The court failed to apply the rule of the *Burns* decision but held such a clause not invalid, since such a provision was not an absolute guide to the intent of the parties, intent to be determined by whether or not the sum is excessive in terms of the *actual breach.*

With this discussion in mind, it would appear that a valid liquidated damages provision can be drawn to meet the requirements of most jurisdictions by explicitly calling for foreiture of a designated sum only upon *termination* of the lease due to a breach of a *material* covenant.

FORFEITURE OF SAME SUM REGARDLESS OF LENGTH OF REMAINING TERM

The rule stated is simply that a stipulation for a forfeiture of an agreed sum regardless of the length of time remaining between the date of premature termination of the lease and the designated time of expiration, will be considered a penalty provision.[27] This rule is based upon the *possibility* that the stipulated sum may be either inadequate or excessive

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22. 81 F.2d 691 (10th Cir. 1936).
23. *Cf.*, Hackenheimer v. Kurtsman, 235 N.Y. 57, 138 N.E. 735 (1923).
24. Nevins Drug Co. v. Bunch, 63 So.2d 329 (Fla. 1953); Rader v. Prather, 100 Fla. 591, 130 So. 15 (Fla. 1930).
25. Hyman v. Cohen, 73 So.2d 393, 400 (Fla. 1954).
26. 109 Wash. 529, 187 Pac. 363 (1920).
27. Jennings v. First Nat'l Bank, 225 Mo. App. 232, 30 S.W.2d 1049 (1930); Hargrove v. Bourne, 47 Okla. 484, 150 Pac. 121 (1915).

depending upon the point of time at which the lease is terminated.[28] Therefore, if the lease is terminated a few days before the expiration of the term, the sum would be unreasonably high, while termination occurring a few days after the start of the lease would be inadequate. In either event, a penal intent is indicated.

Few decisions have made such an interpretation the sole basis for finding a penalty, and most of the decisions discussing the validity of liquidated damage provisions do not consider such contingencies. Some courts have avoided the rule by holding that the possibility of inadequate or excessive damages is not a sufficient reason to change an otherwise valid provision.[29] A practical result was achieved recently when it was held that if forfeiture of a stipulated sum, under such circumstances, will be inconceivably large in relation to probable damages, equity will grant relief. Otherwise, the rule will be inapplicable.[30]

To avoid the necessity for interpretation, it is suggested that the sum be graduated according to the time remaining in the lease, so that as the time progresses, a lesser amount will be retained by the lessor upon breach. This will definitely indicate an attempt to pre-estimate probable damages.

Option of lessor

Another rule which has frequently been used to find a penal intent is a provision giving the Lessor, upon breach of the lease by the Lessee, the *option* to retain an agreed sum as liquidated damages or to apply the sum to the lessor's actual damages if they appear to be greater.[31] Although only in rare instances has this provision been made the sole ground for a decision,[32] it has been generally held to constitute an important factor to be considered. This rule is based upon the lack of mutuality existing in such a clause, since the lessor is given an *option* which is founded only upon his whim or desire and places the lessee in an unfair position.[33] A more cogent reason advanced is that in view of the option, the parties could not have intended to adjust in advance the damages which may arise.[34]

If a valid liquidated damage provision is desired, it is suggested that an option clause should always be avoided.

Uncertainty or difficulty of ascertaining actual damages

Since the basis for providing for liquidated damages is to avoid possible litigation and the consequent uncertainty of jury findings, the courts have

28. Advance Amusement Co. v. Franke, 268 Ill. 597, 109 N.E. 471 (1915); McCelvy v. Bell, 6 S.W. 2d 390 (Tex. Civ. App. 1928) (sum inadequate).
29. Guerin v. Stacy, 175 Mass. 595, 56 N.E. 892 (1900).
30. Hyman v. Cohen, 73 So.2d 393, 401 (1954).
31. Stenor v. Lester, 58 So.2d 672 (Fla. 1952); Schreiber v. Cohen, 38 Misc. 546, 77 N.Y.S. 1081 (Sup. Ct. 1902); Jennings v. First Nat'l Bank of Kansas City, 30 S.W.2d 1049, 1053 (1930).
32. Kanter v. Safran, 68 So.2d 553 (Fla. 1953).
33. Caesar v. Rubinson, 174 N.Y. 492, 67 N.E. 58 (1903).
34. Advance Amusement Co. v. Franke, 268 Ill. 579, 109 N.E. 471, 472 (1915).

established the rule that liquidated damages are to be provided for only in situations where the damages contemplated upon a breach are in their nature uncertain or difficult of ascertainment.[35] This rule arose early at common law in order to grant relief in situations where contracts called for forfeiture of large sums securing lesser sums of money loaned.[36] Although this rule is granted importance in such other contracts as those for the sale of land,[37] little practical significance is placed on this rule in regard to lease agreements. The courts continually aver to such a rule as a guidepost, but as a practical matter the only situation in which it is made a ground for decision is when the stipulated sum will be forfeited upon a breach of a *mere* covenant and, as to some of the covenants, the damages are certain or can be easily ascertained.[38] The impossibility of determining beforehand the nature or amount of damages due to a proper premature termination of a lease has been generally recognized,[39] especially where the lease market is unstable.[40]

Generally, whenever the courts have determined that a provision calls for a penalty due to the ascertainability of damage it is also found that the stipulated sum is disproportionate to probable damages.[41] This question of proportion is probably given greater weight than the factor of certainty. It has properly been suggested that where the agreed sum is reasonable, there should be no objection to enforcing a provision for liquidated damages, regardless of whether or not the damages are ascertainable.[42]

Just compensation

A situation which has probably given the courts the greatest difficulty and which is responsible for most of the apparent inconsistencies in interpreting liquidated damages clauses, arises when the stipulated sum is proportionate to probable damages, but one or more of the provisions are regarded as containing a penal intent. A strict adherence to the rules previously discussed will result in setting aside otherwise reasonable liquidated damages provisions, while disregarding these rules of interpretation and enforcing the *contract* will lead to confusion. This dilemma has given rise to the forceful argument that contracts providing for liquidated damages should be enforced unless the agreed-upon sum is unconscionable;[43] thus

35. Pomeroy, Equity Jurisprudence, § 400 (5th ed. 1951).
36. *See* Loudon v. Taxing District of Shelby City, 104 U.S. 771 (1882); Goodyear Shoe Mach. Co. v. Selz, Schwab & Co., 157 Ill. 186, 41 N.E. 625 (1894).
37. Comment, *Liquidated Damages Clauses in Real Estate Contracts*, 4 Fla. L. Rev. 229 (1951); Pembroke v. Caudill, 160 Fla. 948, 37 So.2d 538 (Fla. 1948).
38. *See* Caesar v. Rubinson, 174 N.Y. 492, 67 N.E. 58 (1903); Alvord v. Banfield, 85 Ore. 49, 166 Pac. 549 (1917).
39. Malone v. Levine, 240 Mich. 222, 224, 215 N.W. 356, 358 (1927).
40. Hyman v. Cohen, 73 So.2d 393, 401 (Fla. 1954).
41. *See* Stimpson v. Minsker Realty Co., 177 App. Div. 536, 164 N.Y.S. 465 (1st Dept. 1917); Electrical Products Corp. v. Ziegler Drug Stores, 141 Ore. 117, 15 P.2d 1081 (1932).
42. McCormick, Damages § 148 (1st ed. 1935).
43. Brightman, *Liquidated Damages*, 25 Col. L. Rev. 277 (1925).

disaffirming in great part the significance of intent in terms of the usual rules of interpretation. However, it is not necessary to stray beyond the pale of the accepted approach to intent, since it is generally accepted that the prime factor in determining the intent of the parties is whether or not the stipulated sum constitutes *just compensation* for the contemplated damages incident to a breach.[44] In either rationale, then, the determinative question is, "Is the stipulated sum reasonably proportionate to the probable loss?" Even in accepting this as a determinative test, the rules previously outlined need not be, and usually are not, disregarded, since the question of proportion is not always easily decided and the rules of interpretation can still be utilized by the court in its final determination.

The test of *just compensation* appears to be gaining in significance and is generally accepted by the federal courts as the determinative factor.[45] The reasoning in *Wise v. United States* is illustrative:[46] "There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced."

In another United States Supreme Court decision, involving a lease providing for a sum equal to the rent reserved for the remainder of term as liquidated damages, the test of *just compensation* was used exclusively to find a penalty provision:[47] "The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstance disclosed that we must hold the provision is for an unenforceable penalty."

Some courts have gone further. In resting their decisions on the rule of *just compensation*, they have explicitly relegated the factor of intent to a position of insignificance. Intent is considered to be of no practical importance and the question is not the intention of the parties but rather, whether or not the stipulated sum is in its very nature a penalty.[48] The agreement for liquidated damages will be voided only when in view of the entire subject matter of the lease, the principle of just compensation has been disregarded.[49]

Generally, the principle of just compensation has been utilized primarily to override the clear language of leases calling for liquidated damages, where the sums appeared to be unconscionable.[50] However, this principle

44. *See* Wise v. United States, 249 U.S. 361, 365 (1919); North Beach Investment, Inc. v. Sheikewitz, 63 So.2d 498, 499 (Fla. 1953); Southern Motor Supply Co. v. Shelbourne Motor Co., 172 Okla. 495, 499, 46 P.2d 562, 565 (1935).

45. United States v. Bethlehem Steel Co., 205 U.S. 105 (1907); Sun Printing and Publishing Ass'n v. Moore, 183 U.S. 642 (1902).

46. 249 U.S. 361, 362 (1919).

47. Kothe v. R. C. Taylor Trust, 280 U.S. 224, 226 (1930).

48. Central Trust Co. v. T. Wolf, 225 Mich. 8, 237 N.W. 29 (1931).

49. Jaquith v. Hudson, 5 Mich. 123 (1858).

50. *See* Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930); Goldstein v. Harjes, 219 App. Div. 275, 219 N.Y.S. 715 (1st Dept. 1927).

has been utilized with increasing frequency as the sole test. This principle is of great importance; probably never has a liquidated damage provision been held to be valid where the sum is found to be excessive in regard to probable damages.

STENOR V. LESTER AND ITS AFTERMATH

A quick survey of the Florida decisions will indicate that the Florida law in this area is subject to the same difficulties and inconsistencies faced by other jurisdictions. The first decision interpreting the validity of a liquidated damage provision is *Stenor v. Lester*[51] which involved a 5-year lease on a Miami Beach hotel providing for a yearly rental of $11,200. A deposit equal to one year's rent was made at the time the lease was executed, the lease providing: "Payments [of the security] are and will be security for the performance by the lessee of all the terms, conditions, covenants and agreements in this lease . . . ." Without further discussion the court ruled that this clause in itself was sufficient to indicate that the parties intended to provide a deposit for security, not liquidated damages.

Since the entire provision calling for liquidated damages is not shown in the case, it is impossible to determine whether the language of the clause met the test of the *Burns* decision. Apparently, the court followed the general rule that forfeiture of a sum upon breach of a *mere* covenant will constitute a penalty. This was not the only basis of the decision, however, since the lease gave the lessor an option to apply the deposit to his actual damages, thus also indicating a penal intent.

In deciding this case the court aligned itself with the majority of jurisdictions, representing what can almost be termed the "classical" approach to such provisions. It is to be noted that although the intent of the parties was said to be the key factor in the decision, little mention was made of it, the court applying two objective principles which could or could not have expressed the actual intent of the parties. No attempt was made to apply the rule of *just compensation* to determine whether the sum was reasonably designed to compensate the lessor for his damages. Logically extended, the court's reasoning would indicate that if one clause is faulty, the entire provision is rendered penal and must fall.

Almost on the heels of the *Stenor* decision come three other causes involving the identical question. Since the fact situations are important in the determination of the court, it will be well to consider them. *Glynn v. Roberson*[52] involved a suit by the lessor to cancel a ten-year lease of a liquor store with a $4,000 yearly rental plus 25% of the net profit over $15,200. A declaration of the rights of the parties to a fund of $36,000, deposited by the lessees, was requested by the lessor. The lease recited that the deposit shall secure all covenants of the lease, but the sum was

51. 58 So.2d 673 (Fla. 1952).
52. 58 So.2d 676 (Fla. 1952).

to be retained by the lessor only upon a cancellation of the lease due to the lessee's default. In addition, the agreement provided in a separate clause, that the deposit was to secure the liquor license, deemed to be a major consideration in determining the amount of rent and deposit.

The court found the evidence ample to cancel the lease but found the provisions as stated constituted a penalty. This finding was based on four grounds: (1) The deposit was to insure against loss of the liquor license and not against failure to perform the other covenants; relying upon the rule that a penalty provision exists where a sum is provided to secure a *particular* breach and the *actual* breach is not provided for in fixing damages;[53] (2) Default of the deposit was predicated on breach of a *mere* covenant; (3) Lessor retained the option to apply the deposit to actual damages; (4) Lessor could not retain as liquidated damages a sum exceeding actual damages and the lessor didn't sustain $32,000 in actual damages.

Although the result achieved is equitable and just, the court's reasoning appears to be inconsistent and, at times, tenuous. The court disregarded the language of the lease, since there is no reason to presume that the deposit was designed only to insure against loss of the liquor license in view of the other important covenants, such as the covenant to pay rent. The distinction made in the *Burns* decision was overlooked and, finally, the court construed the amount to be excessive in terms of the actual damages suffered and not as to what the parties contemplated. The court could have determined that the sum constituted a penalty on the basis of the just compensation rule, but no mention was accorded it.

An early indication of the confusion and difficulty incident to a determination of the meaning of such provisions was provided in *Katz v. Kaplan*.[54] A hotel lease was executed providing for a five-year term with a sum of $19,500, equal to one year's rental, deposited to secure various covenants in the lease. Like the *Glynn* decision, default of the deposit was predicated upon premature termination. Two years after execution of the lease, the lessees defaulted on a rental payment and now seek recovery of the deposit. The court in its original opinion upheld the provision as providing for liquidated damages, but completely reversed itself on rehearing. The entire decision rested upon *Stenor v. Lester*, thus apparently denying the distinction of the *Burns* case.

In view of the result achieved, it is interesting to quote from the unpublished original decision,[55] which relies in great part upon the United States Supreme Court decisions:

> The contracting parties are presumed to understand the hazards of their own business and to appreciate more fully its manifold

53. Moses v. Autuono, 56 Fla. 499, 47 So. 925 (1908).
54. 58 So.2d 673 (Fla. 1952).
55. Reply Brief for Appellees, p. 19, North Beach Investments, Inc. v. Sheikewitz, 63 So.2d 498 (Fla. 1953).

> contingencies, in event of default, than the courts. Naturally, they are more conversant with the business undertaking; they know the attendant uncertainties. Each is dealing voluntarily. One is giving up something in the hope of securing a fixed gain; the other is chancing the bargain with the hope of profit. The lessee is possessed of capacity to contract. He voluntarily contracts in a certain and definite manner. He admittedly defaulted and forced lessors to resort to expensive and vexatious litigation to regain possession of the hotel . . . . He asserts no ambiguity, fraud or overreaching. That being the case, we have no alternative but to let the contract stand as written. The right of contract, when lawfully made, is one of the oldest and salutatory rights known. We, as judges, are bound by our own code of ethics to uphold the law and apply it regardless of hardship to a litigant. He boastfully proclaims this to be a land governed by laws rather than by men. If two men bargain lawfully and one gets the better of the deal, he is entitled to have his contract honored in the courts. This is no new or strange doctrine.

Nash v. Bailey[56] followed almost immediately, and the decision again without discussion, rested upon the *Stenor* case. The liquidated damages provision and the fact situation were almost identical to those in *Katz v. Kaplan*, except that the term of the lease was for a three-year period.

An indication of the extremes which can be attained by a strict adherence to the usual canons of interpretation is provided by the decision in *Kanter v. Safran*.[57] The lease provided for a five-year term, with a deposit of $33,000 equal to one year's rent, to be defaulted in case of breach. In finding a penalty provision, the court relied only upon the *option* provision given the lessor, as indicating the requisite penal intent. It appears difficult to imagine that the complicated and many times elusive quality called "intent" can be conclusively gleaned from the language of this provision alone. Fortunately, the result did not turn exclusively on the interpretation of this clause.

Reflection at this point will indicate that the Florida decisions followed a consistent course. The liquidated damages provisions presented for adjudication were with unanimity held to constitute penalties. All fell due to one or more faulty clauses, indicating clearly that the presence of one of them alone would establish a penal intent. The court seems to have followed the rule that in doubtful cases, liquidated damages provisions were to constitute a penalty,[58] and one faulty clause was enough to provide such doubt.

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56. 58 So.2d 680 (Fla. 1952).

57. 68 So.2d 553 (Fla. 1953).

58. City of N.Y. v. Brooklyn & Manhattan Ferry Co., 238 N.Y. 52, 55, 143 N.E. 788, 790 (1924); *But See, In re* Outfitters Operating Co., 69 F.2d 90, 92 (2d Cir. 1934); *aff'd* Irving Trust Co. v. Perry, 293 U.S. 307 (1934).

This appeared to be the state of the Florida law when the decision in *Sheikewitz v. North Beach Investment Co.*[59] was pronounced. This decision represents a marked departure from the decisions in the prior cases both in attitude and approach to liquidated damages provisions.

Since great stress is put on the particular fact situation here, it will be necessary to consider it in detail. The lease in question involved a ninety-nine year term with a yearly ground rental of $7,500 covering two lots, one of which was vacant, the other having an apartment house located on it. In addition to the ground rent, the lessee was to erect an apartment house on the vacant lot within five years of the execution of the lease. A deposit of $32,500 was posted to secure performance of all covenants, default of the deposit being predicated upon premature termination. The lessor also retained the option to apply the deposit to his actual damages.

The decision in determining that the lease provided for liquidated damages, distinguished the present lease from those involved in the prior decision in that the prior leases involved shorter terms with much less to be done by the lessee. The court concluded by indicating that the damages incident to a breach of the present lease would be much greater. The lessees forcefully urged that certain provisions in the present lease were identical to those involved in the *Stenor* and *Katz* cases and were considered as indicating a penalty. Unfortunately, the decision makes no mention of the interpretation given those provisions under this lease but rather rests its entire rationale apparently upon the principle of *just compensation* in the following language:[60]

> The Court is committed to the doctrine that when the actual damages contemplated by the parties upon breach are susceptible of ascertainment by some known rule or pecuniary standard and the stipulated sum is disproportionate thereto, it will be regarded as a penalty. Such being the case, the corollary of the rule should be true, that is, when the actual damages cannot be susceptible of ascertainment by some known rule or pecuniary standard under reasonable circumstances, the stipulated amount should be regarded as liquidated damages, and the parties should be bound by their covenants and the contract so made. The prime factor in determining whether such sum is a penalty or a forfeiture is whether the sum named is just compensation for damages resulting from the breach.

The latest decision in this area is the recent case of *Hyman v. Cohen.*[61] This decision apparently makes an attempt to clarify the inconsistencies prevalent in the previous decisions, and in doing so, turns away from the departure of the *Sheikewitz* decision, returning once again to the convenience of the time-honored canons of interpretation.

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59. 63 So.2d 498 (Fla. 1953).
60. *Id.* at p. 499.
61. 73 So.2d 393 (Fla. 1954).

The lease in question provided for a five-year term with an annual rental of $25,000. A deposit of $25,000 secured performance of all the lease covenants and like the Katz decision, forfeiture was predicated upon cancellation of the lease. The court finally recognized the distinction made in the *Burns* case and expressly overruled those decisions in which this interpretation was not drawn. For added emphasis, the court interpreted such a clause as providing a *presumption*[62] that the intent of the parties was to adjust their possible damages in advance. Since nothing was presented to overcome this presumption, the lease validly provided for liquidated damages. The rules of ascertainability of damages and just compensation were applied, the court finding that the requirements of the rules were met. It was also noted that the lease did not contain an option clause, which was present in the *Stenor* case.

In certain particulars this decision was lucid and unambiguous, but can it be reconciled with the *Sheikewitz* case and the other Florida decisions? In giving a clause providing for forfeiture of a sum upon premature termination the vitality of a presumption, the court raised some interesting problems. In view of the presumption, what would be the effect of a faulty *option* clause? Would this merely rebut the presumption or would the defect in the option clause be determinative, such as in the *Kanter* decision, or overlooked, as in the *Sheikewitz* case? Would the logical corollary to this presumption follow: that forfeiture predicated upon breach of a *mere* covenant be presumptive of a penalty only and not determinative?

A more important question is the effect of the Hyman decision upon the rule in the *Sheikewitz* case. In disregarding the defect of the option clause, the *Sheikowitz* decision apparently aligned itself with the decisions of the United States Supreme Court[63] which hold that the rule of just compensation was the prime factor in determining whether a stipulated sum is a penalty. Thus we have two important factors which predominate in this area. The *Sheikewitz* rule implies the use of *just compensation* as practically the sole test while the *Hyman* decision gives a particular clause the benefit of a presumption apparently to be considered with the other rules of interpretation.

Probably the most effective way to view these two factors is to consider their importance in terms of the particular fact situations which are to be considered. If the damages incident to breach are of such magnitude or insignificance that the nature of the sum alone can determine the question of penalty of liquidated damages, the *Sheikewitz* rule may be applied. On the other hand, if it is not possible to determine whether the sum approximates the probable damages, the usual rules of interpretation will be applied.

Unfortunately, it is impossible to determine which interpretation is to be given greater weight, but in that the *Kanter* and the *Hyman* decisions

62. I. UNDERHILL, LANDLORD AND TENANT, p. 584 (1st ed. 1909).
63. See note 45 *supra*.

are later in time, it can be assumed that the accepted rules have again forged to the front. It is interesting to note that neither side, in the *Hyman* case, cited the *Sheikowitz* decision and no mention was made of it in the court's decision. Likewise, it will be interesting to note the result when the *Sheikewitz* decision is urged to determine the validity of a liquidated damages provision, for until then, it will be impossible to determine with any exactness, the state of the Florida law in this area.

This short survey of the Florida law clearly indicates the difficulty of attempting to apply hard and fast rules in an area where particular fact situations are of great significance, and where the solution to the conflicting interests of the parties must lie in the peculiar equities involved. Most of the inconsistencies arise when the courts attempt to construe what the parties contemplated or intended when the contract was *executed*; an application of the rules previously discussed frequently clashes with a just solution, leading the courts into a consideration of probable damages *at the time of breach*.[64] Such a consideration of probable damages is frequently necessary but inconsistencies and confusion arise since the courts do not allude to this variance with the established rules.

Consistency in the application of legal rules seems impossible in this area of the law, although highly desirable for economic reasons. The most that can be hoped for is a candid discussion, by the Florida Supreme Court, of the method to be utilized in drawing valid liquidated damage clauses. An attempt was made to accomplish this in the *Hyman* decision, but much more clarity is still needed.

Legal effect of liquidated damages and penalty

A properly drawn liquidated damage provision compensates the injured party for the full measure of his loss, and usually no effect is given to a showing that the actual damages turn out to be more or less than the agreed upon sum.[65] The lessor is entitled to the full sum plus any accrued rental payments owing at the time of breach.[66] On the other hand, if the sum constitutes a penalty, the liquidated damages provision is of no effect, the lessor retaining only that portion of the fund which will reimburse him for his actual and probable damages, the residue returning to the lessee.[67] It is interesting to note that the effect of a finding of a penalty is to transform the sum into a security fund to which the lessor is not confined for his remedy. Thus, the lessor can hold the lessee liable for damages in excess

64. *See* Glynn v. Roberson, 58 So.2d 676 (Fla. 1952); Taylor v. Rawlins, 90 Fla. 621, 106 So. 424 (1905).
65. 4 Corbin, Contracts, §§ 1061, 1062 (1st ed. 1951).
66. Smith v. Navarro, 69 S.W.2d 794 (Tex. Civ. App., 1934).
67. Palace Theatre, Inc. v. Northwest Theatres Circuit, Inc., 186 Minn. 548, 243 N.W. 849 (1932); Chicago Inv. Co. of Mississippi v. Hardtner, 167 Miss. 375, 148 So. 214 (1933).

of the stipulated sum.[68] Under certain circumstances then, a penalty provision works to the benefit of the lessor, since in situations where actual damages can be demonstrated to be greater than the deposit, the lessor can retain the deposit and hold the lessee liable for further damages.

This leads us necessarily into a discussion of some interesting problems peculiar to lease contracts. At common law and generally today, an eviction by summary proceedings of a defaulting lessee terminates the landlord and tenant relationship, thereby terminating the lessee's liability for damages.[69] The lessor is thus given the option to repossess the premises or to permit the lessee to continue in possession and enforce the collection of rents. He is not given the right to both. Many courts, however, have applied the doctrine of anticipatory breach to lease contracts, in cases where there is a material breach followed by renunciation.[70] The measure of damages in such situations is the difference between the rents reserved and the fair market value of the lease.[71] In order to avoid the effect of an eviction, many leases contain covenants by the lessees to remain liable for damages after eviction, and these covenants are usually upheld on the basis that such an agreement is within the power of the parties to contract.[72]

In case of abandonment of the premises by the lessee the lessor is placed in a much better position. He could allow the premises to remain vacant and hold the lessee liable for the rent as it accrued;[73] or, he could take over the premises for his own benefit, thereby, like an eviction, ending the lessee's liability for further rent;[74] or he could re-enter and attempt to re-let for the benefit of the lessee without terminating the lessee's liability under the lease.[75]

Since every question involving a liquidated provision in lease contracts usually involves a breach of the lease, the effect of the parties' action in an abandonment by the lessee or eviction by the lessor is of great practical importance.

Logically, it follows that in view of the termination of the lessee's liability upon eviction, a stipulated sum for liquidated damages, in that it

68. *See* United Cigar Stores Co. of America v. Heithaus, 132 Atl. 655 (1922); Dickinson v. Electric Corp., 10 Cal. App.2d 207, 51 P.2d 205 (1935).

69. International Trust Co. v. Weeks, 203 U.S. 364 (1906); Sutton v. Goodman, 194 Mass. 389, 80 N.E. 608 (1907).

70. Hawkinson v. Johnston, 122 F.2d 724 (8th Cir. 1941); Wukasch v. Hoover, 247 S.W.2d 593 (Tex. Civ. App. 1952).

71. Kanter v. Safran, 68 So.2d 553, 558 (Fla. 1953).

72. Braniewicz v. Wycoski, 306 Ill. App. 187, 28 N.E.2d 283 (1940); Crow v. Kaupp, 50 S.W.2d 995 (Mo. Sup. 1932); Halpern v. Manhattan Ave. Theatre Corp., 173 App. Div. 610, 160 N.Y.S. 616 (1st Dept. 1916), *Aff'd* 220 N.Y. 655, 115 N.E. 718 (1917).

73. Williams v. Aeroland, 155 Fla. 114, 115, 20 So.2d 346, 347 (1944).

74. Rehkopf v. Wirz, 31 Cal. App. 695, 161 Pac. 285 (1916); Brill v. Haifetz, 158 Pa. Super. 158, 44 A.2d 311 (1945).

75. Dickinson v. Electric Corp., 10 Cal. App.2d 207, 51 P.2d 205, 207 (1935); Humiston, Kelling & Co. v. Wheeler, 175 Ill. 514, 51 N.E. 893 (1898).

proves to exceed the damages arising prior to eviction, should be returned to the lessee. But the courts refuse to make such an application when the parties validly contract to liquidate their damages in advance. The courts ground their reasoning on the basis that parties may expressly contract for the survival of liability, and that in view of the agreement for liquidated damages, the *intent* of the parties was to contract for such a survival.[76] In a situation involving a penalty provision, such a survival of liability is not implied and eviction will terminate the liability of the lessee.[77] A situation wherein the lessee abandons the property, or where the lessee covenants to remain liable after eviction, the lessor, by taking over the premises for benefit of the lessee, is in a good position regardless of whether the deposit is held as liquidated damages or as a penalty. If the sum is upheld as liquidated damages, the lessor, of course, retains the sum as the measure of his damages, but if the sum constitutes a penalty, the deposit, now a security fund, may be retained by the lessor until his damages are ascertained; any suit for recovery of the fund before the damages are ascertained will be premature.[78]

Other security devices

In passing, it is interesting to note the legal effect of other security devices. The effect of a security provision alone has already been noted,[79] and usually courts will not interfere with such contracts. Other devices are advance payments of rent and added sums as consideration for the execution of the lease. Both devices are increasing in popularity probably due to the uniform interpretation given such provisions.

Advance rent is normally considered the property of the lessor upon the exchange of the sum,[80] unless the sum is completely disproportionate to damages suffered and in that event, it will be considered as a security provision only.[81] Contracts providing for added consideration have been uniformly upheld and provide an excellent method to avoid the uncertainty of liquidated damages provisions.[82]

Conclusion

Review of the law in this area indicates that no single rule or set of rules are followed consistently in determining the question of liquidated

76. Burns Trading Co. v. Welborn, 81 F.2d 691 (10th Cir. 1936); Hyman v. Cohen, 73 So.2d 393 (Fla. 1954). *But see*, Wilson v. Agnew, 25 Cal. App. 109, 136 Pac. 96 (1913).

77. Stenor v. Lester, 58 So.2d 673 (Fla. 1952); Caesar v. Rubinson, 174 N.Y. 492, 67 N.E. 58 (1903).

78. Kanter v. Safran, 68 So.2d 553 (Fla. 1953); Rosenfeld v. Aaron, 248 N.Y. 437, 162 N.8. 478 (1928); Lenco, Inc. v. Huschfeld, 247 N.Y. 44, 159 N.E. 718 (1928).

79. See note 68 *supra*.

80. Galbraith v. Wood, 124 Minn. 210, 144 N.W. 945 (1914); *But see*, Cunningham v. Stockton, 81 Kan. 780, 106 P. 1057 (1910).

81. *Cf.*, Jensen v. Sparkes, 53 F.2d 433 (9th Cir. 1931); Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156 (1917).

82. See note 3 *supra*.

damages or penalties in lease contracts. For the most part great stress is placed upon each particular fact situation and the opposing equities involved, with the result that the rules of interpretation are frequently utilized or disregarded depending upon the desired result. The modern tendency appears to place less emphasis on the *intent* of the parties, in terms of the *possibility* that the contract *might* have proven to work an inequitable result, and now views liquidated damages provisions with candor, enforcing such provisions within the bounds of reasonableness.

There seems to be no logical reason why courts should not favor or even encourage parties to adjust their damages in advance. This will enable the parties to contract with the knowledge of the result of a breach and will add some stability to lease contracts which are, in their very nature, unstable. This is especially significant in a tourist area such as Florida.

Even more important is the tendency away from litigation which such a view will encourage. Not only will this alleviate in some way, the crowded condition of the courts, but will avoid the harmful effect of litigation on business. Litigation is expensive in terms of money and in terms of time can prove to be disastrous.

JULIUS SER

AIR CARRIERS—TARIFF LIMITATIONS AS A BAR TO PERSONAL INJURY SUITS

INTRODUCTION

Air carriers, like other interstate common carriers, are required to publish tariffs setting forth their rates, fares, charges, and other information pertaining thereto.

Notice of claim and time for suit limitations had, in the past, been included by the air carriers in their filed tariffs,[1] for the alleged purpose of deterring fraudulent claims; the theory being that prompt notice enables the carrier to facilitate timely investigation. The result was that many uninformed passengers, who were not apprised of these conditions, except for a stipulation in the ticket: "sold subject to tariff regulations", were precluded from bringing suit for their injuries.

Realizing that these rules tend to become traps for the unwary, since the traveling public and their lawyers do not think of aviation in terms of special rules of procedure, the Civil Aeronautics Board saw fit to amend its Economic Regulations to the effect that tariff rules limiting or

1. A typical provision of this nature would read as follows:
No action shall be maintained for any injury to or the death of any passenger unless notice of the claim is presented in writing to the general office of the participating carrier alleged to be responsible within ninety days after the alleged occurrence of the events giving rise to the claim and unless the action is commenced within one year after the alleged occurrence. . . .